No. 91-2019

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MINNESOTA, PETITIONER

v.

TIMOTHY DICKERSON

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether a police officer exceeded the scope of the protective pat-down search permitted under *Terry* v. *Ohio*, 392 U.S. 1 (1968), when he briefly rubbed his fingers over a hard object he felt in the pocket of respondent's jacket.

2. Whether, assuming the officer stayed within the bounds of a *Terry* search, he could seize an object from respondent's jacket without a warrant when his sense of touch provided probable cause to believe that the object was contraband.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

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INTEREST OF THE UNITED STATES

This case concerns the scope of the protective pat-down search for weapons authorized by *Terry* v. *Ohio*, 392 U.S. 1 (1968), and the use of the sense of touch during a pat-down search to develop probable cause to believe that an item is contraband. Those questions require the Court to interpret the Fourth Amendment's prohibition of unreasonable searches and seizures. The Court's decision will therefore apply to both state and federal law enforcement activities. The United States accordingly has a significant interest in this case.

STATEMENT

1. Two officers with the Minneapolis, Minnesota, Police Department were on routine patrol in a marked car on the evening of November 9, 1989, when they saw respondent coming out of a known "crack house." Pet. App. A3, B3; 2/20/90 Tr. 6-8. The house was a 12-unit apartment building at which the police had previously seized both drugs and weapons. 2/20/90 Tr. 6-7, 21-22. The officers saw respondent come down the stairs of the building and start walking toward the front sidewalk. Upon seeing the police car and making eye contact with the officers, respondent "abrupt[ly]" turned around and headed toward an alley behind the building. Pet. App. A3, A13; 2/20/90 Tr. 6-8, 13-14.[1]

One of the policemen, Officer Vernon Rose, testified that he became suspicious when he noticed respondent's sudden change in direction, and he decided to "check [respondent] for weapons and contraband." 2/20/90 Tr. 8-9; Pet. App. A3. Officer Rose and his partner drove into the alley. Rose got out of the car, confronted respondent (whom he did not know), and ordered him to submit to a pat-down search. According to Officer Rose (2/20/90 Tr. 9): "[A]s I pat searched the front of his body I felt a lump, a small lump in the front pocket" of respondent's thin nylon jacket. He continued: "I examined it with my

[1] Defendant offered a different version of the events. He said he never saw the police car, never made eye contact with the officers, and went directly down the stairs of the apartment building to the sidewalk leading to the alley. 2/20/90 Tr. 27-30. The trial court, however, believed the police officer's version. Pet. App. C1-C2.

fingers and slid it and it felt to be a lump of crack cocaine in cellophane." *Ibid.* Officer Rose then reached into the pocket and pulled out a small rock of crack cocaine in a knotted sandwich bag. *Id.* at 9-10, 32; 5/9/90 Tr. 64-65; Pet. App. C2.

Officer Rose testified that he had been on the Minneapolis Police force for 14 years and had spent more than 11 years assigned to the north side of the city, where these events occurred. 2/20/90 Tr. 4. Rose also said he had previously "felt [crack] * * * in clothing" between 50 and 75 times and "was absolutely sure that's what it was." *Id.* at 9, 10; see also *id.* at 5-6.

Respondent was charged in the District Court of Hennepin County, Minnesota, with possessing a controlled substance, in violation of Minn. Stat. Ann. § 152.025(2)(1) (West Supp. 1992). Pet. App. D1.

2. Respondent moved to suppress the crack on the ground that it had been seized in violation of the Fourth Amendment. After a hearing, the district court denied the motion. Pet. App. C1-C3. The court concluded, first, that "Officer Rose had a reasonable suspicion based upon objective facts that [respondent] was involved in criminal activity," and that Rose was therefore justified in stopping respondent. *Id.* at C3. That conclusion was based on the fact that respondent was seen coming out of a "known crack house" and that he abruptly changed direction when he saw the police. *Id.* at C4. The court further concluded that "Officer Rose had additional reasonable grounds based upon objective facts to conduct the pat-down search for weapons in the alley." *Id.* at C3. The additional grounds cited by the court were that

respondent had come out of a building where weapons had been seized and that his encounter with the police had occurred in a dark alley. *Id.* at C5.

Finally, the court ruled that "Officer Rose seized the crack/cocaine based upon the feel and touch of the item located in [respondent's] pocket and [that] this seizure was reasonable." Pet. App. C3. Likening the situation to one in which an officer sees contraband in plain view, the court reasoned:

> [T]here is no distinction as to which sensory perception the officer uses to conclude that material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Id. at C5.

After a trial based on the hearing record and certain stipulated facts, the district court found respondent guilty. 3/13/90 Tr. 61; 5/9/90 Tr. 65-66. The court deferred entry of judgment and placed defendant on two years' probation. 5/9/90 Tr. 68-69; Pet. 5-6. Upon petitioner's successful completion of probation, the charges against him were dismissed, as

required by state law. Pet. 6; Pet. App. D2; Minn. Stat. Ann. § 152.18(1) (West 1989 & Supp. 1992).[2]

3. The Minnesota Court of Appeals reversed. Pet. App. B1-B12. It agreed with the trial court that "[respondent's] stop was justified," and that "[Officer] Rose had an articulable objective basis to perform a limited pat search." *Id.* at B6, B7. The court of appeals nonetheless concluded that the crack was inadmissible because "the scope of the pat search exceeded constitutional parameters." *Id.* at B7. The court "decline[d] to adopt the plain feel exception in Minnesota" because it believed that "the proper analysis in this case must focus upon the limited purpose associated with a pat search." *Id.* at B10.

4. By a 4-3 vote, the Minnesota Supreme Court affirmed the court of appeals' decision. Pet. App. A1-A24. Like the court of appeals, the supreme court held that "the stop was valid" and that the pat-down search was "justified." *Id.* at A5. With respect to the "remaining issue * * * whether the search was 'carefully limited' as *Terry* requires," the supreme court affirmed the court of appeals' holding that "[the] police exceeded the scope of a *Terry* search." *Ibid.*

In the majority's view, the pat-down search of respondent "went far beyond what is permissible under *Terry*." Pet. App. A5. That view was based on "the officer's testimony that he intended to conduct a

[2] Although the charges against respondent were dismissed, a non-public record of the proceedings is retained "by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against [respondent]." Pet. App. D2; Minn. Stat. Ann. § 152.18 (1) (West 1989 & Supp. 1992).

warrantless search for drugs, combined with his testimony about squeezing, sliding, and otherwise manipulating the contents of [respondent's] pocket." *Id.* at A7. The court held that "[d]uring the course of a frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is." *Ibid.*

The court declined to adopt a "'plain feel' exception" to the warrant requirement. Pet. App. A8 n.1. The court initially determined that "[e]ven if [it were to] recognize[] a 'plain feel' exception, the search in this case would not qualify" under the exception. *Ibid.* In any event, the court was unwilling to "extend the plain view doctrine to the sense of touch," for two reasons. First, it believed that "the sense of touch is inherently less immediate and less reliable than the sense of sight." Second, it considered the sense of touch to be "far more intrusive into the personal privacy that is at the core of the fourth amendment." *Id.* at A8.

Three justices dissented "from that part of the decision which holds the trial court erred in admitting the contraband into evidence." Pet. App. A13. In the dissenters' view, Officer Rose's search was "not too intrusive." *Id.* at A18. Rather, Rose's "simple act of feeling the outline and shape of the lump was permissible under *Terry*," because *Terry* justifies a "*careful* exploration" of the suspect's outer clothing. *Ibid.* (quoting, with emphasis, *Terry*, 392 U.S. at 16). The dissenters argued that a police officer may seize contraband during a *Terry* search "if because of the feel of the object and other circumstances it is immediately apparent that the

object, although not a weapon, is contraband." Pet. App. A22.

SUMMARY OF ARGUMENT

I. The Minnesota Supreme Court erred in holding that the police officer who searched respondent exceeded the scope of the protective pat-down search authorized under *Terry* v. *Ohio*. *Terry* authorizes a "careful exploration" of a suspect's outer clothing for weapons. 392 U.S. at 16. Officer Rose's brief and limited touching of the pocket of respondent's jacket was an appropriate part of the "careful" examination permitted under *Terry*. Officer Rose did not engage in the sort of prolonged and intrusive manipulation of clothing about which the state supreme court expressed concern. Nor does the record support the suggestion of the state supreme court that Rose made a discrete, conscious decision to continue handling the object in respondent's pocket after concluding that the object was not a weapon. Instead, the officer's act of feeling the object was merely a continuation of a pat-down search indisputably justified at its inception. For that reason, the officer's actions are distinguishable from the conduct found to constitute a separate, unauthorized search in *Arizona* v. *Hicks*, 480 U.S. 321 (1987).

II. The Minnesota Supreme Court also erred in holding that the sense of touch can never provide probable cause to believe that the object felt is contraband. This Court has recognized that probable cause can be acquired through senses other than the sense of sight. For example, in *United States* v. *Johns*, 469 U.S. 478, 482 (1985), the Court held that the "distinct odor of marihuana" provided probable

cause to believe that the vehicles from which the odor emanated contained contraband. Moreover, this Court's decision in *Terry* is premised on the ability of police officers to detect concealed firearms by touching the outside of a suspect's clothing. Many lower federal courts have held that the sense of touch may provide probable cause to believe that an item is contraband. In holding to the contrary, the court below mistakenly relied on the differences it perceived between the sense of sight and the sense of touch. Those differences do not warrant a categorical prohibition on use of the sense of touch to acquire probable cause.

ARGUMENT

I. OFFICER ROSE WAS CONDUCTING A LAWFUL PAT-DOWN SEARCH WHEN HE ACQUIRED PROBABLE CAUSE TO BELIEVE THAT RESPONDENT POSSESSED CONTRABAND

The Minnesota Supreme Court not only declined as a general matter to recognize a "plain feel" corollary to the "plain view" doctrine; it also held that the crack seized from respondent's pocket would not be admissible under a "plain feel" analysis in any event. Pet. App. A8 n.1. The latter holding was based on the court's view that, in the course of determining that the object in respondent's pocket was crack, Officer Rose exceeded the scope of the protective pat-down search authorized under *Terry* v. *Ohio*, *supra*. To the contrary, we submit that Officer Rose was acting within the scope of *Terry* when he developed probable cause to believe that respondent was in possession of contraband.

At the outset, we agree with the premise underlying the state court's *Terry* holding: A "plain feel" corollary to the "plain view" doctrine would not authorize a police officer to seize evidence without a warrant if the police officer violated the Fourth Amendment in the course of developing probable cause to support the seizure. An "essential predicate" of a seizure based on "plain feel," like one based on "plain view," is that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly [felt]." *Horton* v. *California*, 496 U.S. 128, 136 (1990). Thus, if a police officer reaches into a suspect's pocket without reasonable suspicion or probable cause and feels an object that the officer knows to be contraband, the seizure of that object cannot be justified on the ground that the seizure was the product of a "plain feel" of the object. In *Sibron* v. *New York*, 392 U.S. 40, 65 (1968), this Court held that such an intrusion was unlawful, because the intrusion was not justified by reasonable suspicion or probable cause to believe that the suspect had contraband or a weapon in his pocket. The Court therefore ordered suppression of the contraband found in the course of that search.

Officer Rose's conduct, however, was a far cry from the sort of intrusion held to violate the Fourth Amendment in *Sibron*. This was not a case of retroactively justifying a search by what it turned up; rather, because the pat-down search was lawful, the fruits of that search could be considered in determining the lawfulness of Officer Rose's further investigative steps. See *Adams* v. *Williams*, 407 U.S. 143, 148 (1972).

Officer Rose's unrebutted testimony established that his feeling of respondent's jacket pocket was brief and quite limited in scope. As the officer described it, he felt the object in the midst of the pat down, as his hands swept from respondent's shoulders down to his waist and across his chest. 2/20/90 Tr. 9. The officer's feeling of the rock of crack cocaine, as described in the officer's testimony and the district court's findings, Pet. App. C2, C5, was part of the pat-down process, not an independent search or a departure from the process of patting down respondent's clothing. It was thus a part of the "careful exploration" of respondent's outer clothing permitted under *Terry*, 392 U.S. at 16.

The state supreme court acknowledged that the trial court had found "that when the officer felt [respondent's] jacket pocket, he knew immediately he was feeling a plastic bag containing a lump of crack cocaine." Pet. App. A6. Nonetheless, the court chose to characterize the sequence of events quite differently. The court suggested that Officer Rose's search was in effect subdivided into two discrete parts —one part in which the officer found something that he decided was not a weapon, and a second part in which he decided to continue exploring to determine what the object was. Because the court viewed the search as containing two discrete elements, the court readily reached the conclusion that the officer's conduct was unlawful:

> Once it was apparent that the defendant had no weapon, *Terry* ceased to legitimize the officer's conduct. Any further intrusion into the defendant's privacy required a warrant or probable cause to arrest, and the officer had neither. Instead, he continued feeling the defendant's person until he found what he was looking for all along.

Pet. App. A12.

The supreme court's characterization of the record was based on Officer Rose's testimony that he was sure he had discovered crack cocaine when, upon feeling a lump in respondent's jacket pocket, he "examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane." 2/20/90 Tr. 9. But that testimony does not support the state court's view that Officer Rose in effect interrupted his search for weapons to conduct an independent examination of the lump in respondent's jacket pocket. Instead, the testimony supports the district court's finding that Officer Rose immediately concluded that the object in respondent's pocket was crack, and that he did not make an initial determination that the object was not a weapon and then a separate decision to keep searching.[3]

The state court's artificial parsing of Officer Rose's actions reflects the sort of "library analysis"

[3] In holding that Officer Rose exceeded the scope of a valid *Terry* search, the Minnesota Supreme Court erred in relying (Pet. App. A6) on the officer's testimony that he stopped respondent to search for both weapons and drugs. As this Court explained in *Horton*, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is * * * a valid exception to the warrant requirement." 496 U.S. at 138.

that this Court has cautioned should not guide Fourth Amendment analysis. *United States* v. *Cortez*, 449 U.S. 411, 418 (1981). As a practical matter, a police officer cannot put aside his training and experience in detecting concealed drugs while conducting a pat-down search. Nor should he be required to ignore an object that his experience and training enable him to identify as contraband. To be sure, the limited purpose of a *Terry* search is "to allow the officer to pursue his investigation without fear of violence." *Adams* v. *Williams*, 407 U.S. at 146. Thus, as the Minnesota Supreme Court observed (Pet. App. A7), *Terry* does not authorize the sustained "pinch-[ing] and squeez[ing] and twist[ing] and pull[ing] and rub[bing] * * * [of] a suspect's pocket." But it does not prohibit the momentary manipulation of a suspect's outer clothing that occurred here.

Because Officer Rose's brief manipulation of the object in respondent's pocket was part of the ongoing, legitimate pat-down search, this case is distinguishable from *Arizona* v. *Hicks*, 480 U.S. 321 (1987). In *Hicks*, the Court held that a police officer violated the Fourth Amendment when, during the search of an apartment where a shooting had just occurred, he moved a turntable to see its serial number, based on a reasonable suspicion that the turntable was stolen. 480 U.S. at 324-329. The Court found that the officer's movement of the turntable constituted "a 'search' separate and apart from the search for the shooter, victims and weapons that was the lawful objective of his entry into the apartment." *Id.* at 324-325. The officer's action was "unrelated to the objectives of the authorized intrusion * * * [and]

produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstance that validated the entry." *Id.* at 325. The "search" of the turntable was conceded to have occurred without probable cause. Holding that probable cause was required to support a search under the "plain view" doctrine, the Court concluded that the search of the turntable was unreasonable under the Fourth Amendment.

The movement of the turntable in *Hicks* was wholly distinct from the actions related to the search for the shooter and firearms; here, in contrast, the manipulation of the object in respondent's pocket was merely a continuation of a lawful protective search for weapons.[4] In *Hicks*, the Court discerned a "bright line" (480 U.S. at 339 (O'Connor, J., dissenting)) between the challenged conduct and the conduct related to the objective authorizing the search. No similar line can be drawn in this case.

[4] The distinction between conduct that is part of the pat-down search and conduct that departs from the scope of the search authorized by *Terry* is illustrated by *Leake* v. *Commonwealth*, 265 S.E.2d 701 (Va. 1980). There, a police officer who had stopped a suspect for questioning picked up and shook a rolled-up paper bag that the suspect had set down. The court held that the officer's examination of the bag was not within the scope of the pat-down authority provided by *Terry*.

II. OFFICER ROSE WAS AUTHORIZED TO SEIZE THE CONTRABAND WITHOUT A WARRANT, BECAUSE HIS SENSE OF TOUCH PROVIDED PROBABLE CAUSE TO SUPPORT THE SEIZURE, AND THE SEIZURE WAS JUSTIFIED AS A SEARCH INCIDENT TO AN ARREST

Assuming, as we have argued above, that Officer Rose was acting within the bounds of a lawful *Terry* search when he determined that the object was a rock of crack cocaine, two questions remain: whether the officer's perception of the object through his sense of touch could give rise to probable cause to believe that the item was contraband; and, if so, whether the officer was entitled to seize the object without a warrant. We submit that the answer to both questions is yes.

A. The Sense Of Touch May Provide Probable Cause To Believe That An Item Is Evidence Of A Crime

The Minnesota Supreme Court erred in holding that the sense of touch may never give rise to probable cause to believe that an item is contraband. See Pet. App. A8-A11. This Court has indicated that probable cause may be acquired through senses other than the sense of sight, and the lower courts have squarely and repeatedly held that the seizure of evidence may be supported by probable cause developed through the sense of touch.

The Court has recognized in several cases that probable cause may be established through senses other than sight. For example, in *Johnson* v. *United States*, 333 U.S. 10, 13 (1948), where federal narcotics agents smelled the distinctive odor of burning opium from the hallway outside a hotel room, the Court

rejected the argument that the odor alone was an insufficient basis upon which to issue a search warrant for the room. Similarly, in *Taylor* v. *United States*, 286 U.S. 1, 6 (1932), the Court stated that "[p]rohibition officers [could] rely on [the] distinctive odor" of alcohol "as a physical fact indicative of possible crime." Finally, in *United States* v. *Johns*, 469 U.S. 478, 482 (1985), the Court held that, after police officers "detected the distinct odor of marihuana" emanating from packages in pickup trucks, "they had probable cause to believe that the vehicles contained contraband." *See also United States* v. *Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists * * *."); cf. *United States* v. *Place*, 462 U.S. 696, 707 (1983) (specially trained drug-sniffing dog could detect presence or absence of contraband).[5]

Terry v. *Ohio* contains the clearest implication that the sense of touch may provide probable cause to believe that an item is contraband. In *Terry*, the officer "patted down the outer clothing" of the defendant "until he had felt weapons" and thereupon reached into the clothing and seized them. 392 U.S. at 29-30. Thus, the officer never saw the weapons before

[5] In other cases discussing the "plain view" doctrine, the Court has described the doctrine in terms suggesting that it is not limited to what can be perceived through the sense of sight. See *Horton*, 496 U.S. at 137 n.7 ("Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause." (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971)); *Texas* v. *Brown*, 460 U.S. 730, 737, 738 n.4, 739 (1983) (plurality opinion).

he seized them; he only felt them. The Court upheld the seizure of those weapons without a warrant, plainly implying that the feel of the weapons through the clothing, standing alone, furnished probable cause for their seizure. 392 U.S. at 29-31.

Based on this Court's precedents, all of the lower federal courts that have addressed the issue have held that the sense of touch may provide probable cause to believe that the item felt is contraband. See, *e.g.*, *United States* v. *Coleman*, 969 F.2d 126, 132 (5th Cir. 1992); *United States* v. *Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States* v. *Williams*, 822 F.2d 1174, 1181-1186 (D.C. Cir. 1987); *United States* v. *Norman*, 701 F.2d 295, 297 (4th Cir. 1983), cert. denied, 464 U.S. 820 (1983); *United States* v. *Russell*, 655 F.2d 1261, 1264 (1981), modified, 670 F.2d 323 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982); *United States* v. *Ocampo*, 650 F.2d 421, 428-429 (2d Cir. 1981); *United States* v. *Portillo*, 633 F.2d 1313, 1319-1320 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); see also *United States* v. *Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), cert. denied, 112 S. Ct. 1975 (1992).[6]

[6] Most of the state courts to address the issue have likewise adopted the "plain feel" corollary to the "plain view" doctrine. See, *e.g.*, *People* v. *Chavers*, 658 P.2d 96, 102-104 (Cal. 1983); *People* v. *Lee*, 240 Cal. Rptr. 32, 37 (Cal. Ct. App. 1987); *Henderson* v. *State*, 535 So. 2d 659, 660-661 (Fla. Dist. Ct. App. 1988); *In re Marrhonda G.*, 575 N.Y.S.2d 425, 429-432 (Fam. Ct. 1991); *State* v. *Washington*, 396 N.W.2d 156, 161-162 (Wis. 1986); see also *State* v. *Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App. 1991) (dictum). But see *State* v. *Collins*, 679 P.2d 80, 83-84 (Ariz. Ct. App. 1983); *People* v. *McCarty*, 296 N.E.2d 862, 863 (Ill. App. Ct. 1973); *State* v. *Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); cf. *Commonwealth* v. *Marconi*, 597 A.2d 616, 621-624 (Pa. Super. Ct. 1991) (dictum), appeal denied, 611 A.2d 711 (Pa. 1992).

The reasons advanced by the Minnesota Supreme Court for declining to follow those decisions are not persuasive. First, the court believed that "the sense of touch is inherently less immediate and less reliable than the sense of sight." Pet. App. A8. As other courts have recognized, however, "[w]hen objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects [may] provide[] the officer with the same recognition his sight would have produced." *United States* v. *Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), aff'd, 893 F.2d 1103 (9th Cir. 1990) (per curiam).

Moreover, whatever sense is used to acquire information, the information must yield the same quantum of objective justification in order to support a seizure: probable cause. Thus, if one sense is ordinarily more informative or reliable than another, that means only that there will be fewer cases in which the less informative or reliable sense will provide probable cause. Nonetheless, probable cause is probable cause, regardless how one comes by it; it is a "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). That probability can be established by seeing, hearing, smelling, touching, or tasting—or by a combination of those senses. See *Johnson* v. *United States*, 333 U.S. at 13 ("If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and

it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."); *United States* v. *Norman*, 701 F.2d at 297 ("To be obvious to the senses, contraband need only reveal itself in a characteristic way to one of the senses.").

The real concern of the Minnesota Supreme Court appeared to be that the sense of touch does not provide enough information to constitute probable cause as often as does the sense of sight. As *Terry* suggested, however, objects with distinctive shapes, such as guns, can often be identified as easily by touch as by sight. A rock of crack cocaine, on the other hand, may not be easily identified as such by a layman either by sight or touch. Yet, a trained and experienced police officer, such as Officer Rose, may be able to identify crack cocaine easily through either sense. See 2/20/90 Tr. 4-6, 9-10; see also *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979). In short, the question whether information provided by touch provides probable cause must be resolved on the facts of each case, as is true of information provided through the other senses. Each of the five senses has its limits. Nonetheless, concern about those limits should not disqualify a whole category of information, as the court below believed.

The Minnesota Supreme Court also expressed concern that, compared to the sense of sight, the sense of touch is "far more intrusive into the personal privacy that is at the core of the fourth amendment." Pet. App. A8. That concern, however, overlooks a necessary predicate to application of either the plain view doctrine or its "plain feel" corollary. As discussed

above, a police officer must be acting lawfully when he views or touches an object before his observation or feel can justify seizure of the object. See *Horton* v. *California*, 496 U.S. at 136; *Texas* v. *Brown*, 460 U.S. 730, 738-739 (1983). Compare *United States* v. *Coleman*, 969 F.2d at 132 (because officer was allowed to touch pouch inside car as part of *Terry* search for weapons, his discovery of weapon was justified under "plain feel" analysis), with *United States* v. *Most*, 876 F.2d 191, 195-196 (D.C. Cir. 1989) (where officer had no basis for initial touching, discovery of contents through sense of touch was also unlawful, as " '[p]lain touch' analysis is appropriate * * * only after the initial contact has been determined to be lawful"). In the context of a pat-down search, that means that an officer must stay within the bounds of *Terry* both in initiating and in conducting the search. 392 U.S. at 27-28. The officer's compliance with *Terry* ensures against the sort of unconstitutional intrusions about which the court below was concerned.

Here, the officer was justified in touching respondent in the first place, because he had lawful grounds for conducting a pat-down search. The Minnesota Supreme Court specifically held that the pat-down search was justified by reasonable suspicion, Pet. App. A5, and that proposition is not in dispute here. Furthermore, as we have argued above, the officer did not exceed the scope of a lawful *Terry* search when he felt the crack rock in the course of conducting the pat-down search. Under those circumstances, the officer was engaged in lawful conduct when he determined by "plain feel" that the item in the jacket pocket was contraband. His touching of the

object therefore legitimately established probable cause to believe that respondent was committing a crime.

B. Seizure Of The Contraband In Respondent's Pocket Was Justified As A Search Incident To Respondent's Arrest

The final question is whether, having acquired probable cause to believe that respondent possessed crack, Officer Rose was justified in seizing the crack without a warrant. That question reflects the requirement that, in order to seize evidence or contraband, an officer must have "a lawful right of access to the object itself." *Horton* v. *California*, 496 U.S. at 137. We submit that the seizure of the crack in this case was justified as a search incident to the lawful arrest of respondent.

In many plain view cases, a warrantless seizure is permitted because the item in plain view has been left in a public place. In that situation, the seizure of the item does not intrude upon any privacy interest, but only on the possession and ownership interests of the owner. In that setting, probable cause standing alone is enough to justify the seizure. See *Texas* v. *Brown*, 460 U.S. at 738-739; *Payton* v. *New York*, 445 U.S. 573, 587 (1980).

In other cases, however, an object may be in open view but located in a place to which officers do not have an unqualified right of access. See *Horton* v. *California*, 496 U.S. at 137 & n.7; *Texas* v. *Brown*, 460 U.S. at 738; *Payton* v. *New York*, 445 U.S. at 587. For example, in *Taylor* v. *United States*, *supra*, prohibition officers were able to smell whiskey coming from a garage on private property and could see through an

opening in the garage "many cardboard cases which they thought probably contained jars of liquor." 286 U.S. at 5. Those perceptions, coupled with "numerous complaints concerning the use of these premises" for storage of alcohol (*id.* at 6), gave the officers probable cause to believe that there was contraband on the premises. Nonetheless, the Court held that in the absence of exigent circumstances, the officers were required to obtain a warrant before entering the property to seize the liquor. *Ibid.*

Taylor suggests that the access requirement applies whether probable cause is provided by sight, by one of the other senses, or by a combination of senses. To the same effect is *Johnson* v. *United States*, *supra*, where police officers smelled the unmistakable odor of burning opium coming from a hotel room. 333 U.S. at 12. The Court in *Johnson* rejected the argument that "odors cannot be evidence sufficient to constitute probable grounds for any search," stating that an odor "sufficiently distinctive to identify a forbidden substance" could "very well be found to be evidence of the most persuasive character." *Id.* at 13. The Court nonetheless held that the officers were required to obtain a warrant before entering the hotel room. *Id.* at 13-17; see also *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 468 (1971).[7]

[7] Similarly, when a dog sniff provides probable cause to believe that a piece of luggage contains narcotics, the bag ordinarily may not be opened until a warrant is obtained. See *United States* v. *Place*, 462 U.S. at 701.

The access requirement applies in this case as well. Although Officer Rose acquired probable cause to believe that respondent's jacket pocket contained cocaine, that was not sufficient to justify his reaching into the jacket pocket and seizing the cocaine. The justification for undertaking a *Terry* pat-down search will allow the seizure of a weapon found in the course of that search, but it will not authorize a search for other kinds of evidence of a crime. *Sibron*, 392 U.S. at 65-66; see also *Ybarra* v. *Illinois*, 444 U.S. 85, 93-94 (1979); *Adams* v. *Williams*, 407 U.S. at 146. The seizure of the crack had to be authorized either by a search warrant or by one of the established exceptions to the warrant requirement.

The seizure here was justified as a search incident to respondent's arrest. When Officer Rose acquired probable cause to believe that respondent possessed crack cocaine, he had probable cause to believe that respondent was committing a crime, and he was therefore authorized to arrest respondent for that crime and to conduct a search of respondent's person incident to that arrest. See *New York* v. *Belton*, 453 U.S. 454, 461 (1981); *United States* v. *Robinson*, 414 U.S. 218, 235 (1973). Although the search and seizure of the cocaine preceded respondent's formal arrest, that is not significant under the circumstances of this case. It is true that "an incident search may not precede an arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U.S. at 63; *Smith* v. *Ohio*, 494 U.S. 541, 543 (1990) (per curiam). But where, as here, the police have probable cause to arrest the defendant before conducting the search, and "the formal arrest follow[s] quickly on the heels

of the challenged search," it is not "particularly important that the search precede[s] the arrest rather than vice versa." *Rawlings* v. *Kentucky*, 448 U.S. 98, 111 (1980); accord, *e.g.*, *United States* v. *Miller*, 925 F.2d 695, 698-700 (4th Cir.), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Potter*, 895 F.2d 1231, 1234 (9th Cir.), cert. denied, 497 U.S. 1008 (1990); *United States* v. *Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988); *United States* v. *Donaldson*, 793 F.2d 498, 502-503 (2d Cir. 1986), cert. denied, 479 U.S. 1056 (1987).[8] The district court was therefore correct in holding that, because Officer Rose had probable cause to believe the object in respondent's jacket pocket was a piece of crack cocaine, it was lawful for him to seize the object and place respondent under arrest.

[8] Alternatively, the seizure of the cocaine from respondent's pocket was justified by exigent circumstances. See *California* v. *Acevedo*, 111 S. Ct. 1982, 1985-1986 (1991); *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978). If the police had not arrested respondent or searched his pocket on the scene, he would have departed the scene and promptly disposed of the evidence.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

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